[**Waiver 1993-2**]
W-93-45

MEMORANDUM

March 15, 1993

TO: Anne Schmitz, Chair
Montgomery County Commission on Child Care

FROM: Jay L. Cohen, Chair
Montgomery County Ethics Commission

RE: Advisory Opinion and Waiver

The Ethics Commission has reviewed your memorandum dated December 8, 1992. On behalf of the members of the Montgomery County Commission on Child Care (MCCCC), you have asked for advice concerning the applicability of certain provisions of the Montgomery County Public Ethics Law to the members of MCCCC and for appropriate waivers as necessary. The Ethics Commission has distilled the issues raised in your memorandum as follows:

1. Will the Ethics Commission grant a waiver to allow a member of MCCCC to participate in a matter that directly benefits a business in which the member has an economic or fiduciary interest?
2. Does the ethics law prohibit a member of MCCCC who is a parent from advocating funding for a program which benefits parents?
3. Is Ethics Commission Opinion 90-1 still valid and applicable to members of MCCCC?

Section 27-62 creates the MCCCC and provides that the County Executive appoints to the MCCCC 18 voting members subject to confirmation by the County Council.[1] Under Section 27-62, 7 members should be providers of child care services (industry representatives), 5 members should be parents of children receiving child care services, 5 members should be selected from the business community and the general public, and one member should represent the Montgomery County Chapter of the Maryland Municipal League. Presently, each group of representatives has at least one member who has an economic or fiduciary interest in a child care provider.[2]

Section 27-62(f) provides that MCCCC must issue an annual report recommending short and long-term measures the County should adopt to improve child care services. The MCCCC is authorized to evaluate County funding policies and programs affecting child care and make recommendations regarding the use of public

[1] Unless otherwise indicated, section references are to the Montgomery County Code (1984).
[2] A fiduciary interest is created by holding a position of trust in a business. A position of trust includes being an officer or member of a governing body of a business. A fiduciary owes a high degree of loyalty to the business which the fiduciary serves.

funds to be spent on behalf of child care services. MCCCC also reviews standards for licensing and the operation of child care services and programs.

The basic conflict of interest rules in the ethics law are set out in Section 19A-11 which states:

> (a) Unless permitted by waiver, a public employee must not participate in:
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> (1) any matter that affects, in a manner distinct from its effect on the public generally, any:
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> (A) property in which the public employee holds an economic interest;
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> (B) business in which the public employee has an economic interest; or
>
> (C) property or business in which a relative has an economic interest, if the public employee knows about the relative's interest;
>
> (2) any matter if the public employee knows or reasonably should know that any party to the matter is:
>
> (A) any business of which the public employee is an officer, director, trustee, partner, or employee;

I. Participation in a matter that directly benefits a business in which a member of MCCCC has an economic or fiduciary interest.

Section 19A-11(a)(1) prohibits a public employee from participating in a matter that affects a business in which the public employee has an economic interest.[3] In addition, Section 19A-11(a)(2)(A) prohibits a public employee from participating in a matter that involves, as a party, a business of which the public employee is an officer, director, or employee. The Ethics Commission finds that the ethics law prohibits a member of MCCCC from participating in a matter involving a program which the member knows or reasonably should know directly benefits a business in which the member may have an economic or fiduciary interest.

MCCCC has asked for a waiver for each member of MCCCC to participate in matters that involve the funding of programs that are "generally available to all qualified child care providers." Section 19A-11 prohibits a public employee from participating in a matter only if the matter affects the employee in a manner distinct from its effect on the public generally or involves as a party a business in which the member has an economic or fiduciary interest. The Ethics Commission concludes that it is not a conflict of interest

[3] Section 19A-4(m) provides that a public employee includes any person appointed to a County commission whether or not the person is compensated for serving on the body. Section 19A-4(b) defines, for purposes of the ethics law, a business to include a non-profit entity such as an institute, trust, or foundation. Under Section 19A-11(c) an economic interest generally must exceed a value threshold of $1,000.

for members of MCCCC to participate in a matter involving a program under which all qualified child care providers may be eligible for a County contract or other benefit.[4] Accordingly, a waiver is not necessary.

The ethics law, however, does prohibit a member of MCCCC from participating in a matter involving a matter the member knows or reasonably should know directly benefits a business in which the member has an economic or fiduciary interest. A matter directly benefits a business if the business:

(1) holds a County contract to perform services or provide goods under a program involved in the matter;

(2) would receive a County contract to perform services or provide goods under a program involved in the matter as a sole source provider or as a grantee.

The MCCCC has requested a waiver to allow all members of MCCCC to discuss, but not vote on, any matter that directly benefits businesses in which the member has an economic or fiduciary interest.

Section 19A-8 authorizes the Commission to grant a public employee or class of public employees a waiver from the prohibitions of Section 19A-11 if the Commission finds that:

(1) The best interest of the County would be served by granting a waiver;

(2) The importance to the County of a public employee performing his or her official duties outweighs the actual or potential harm of any conflict of interest; and

(3) Granting the waiver will not give a public employee an unfair advantage over other members of the public.

In applying these criteria, the Commission makes the following findings:

1. The County law establishing the MCCCC creates more than a disinterested advisory committee; it creates an advocacy body. Section 27-62(c) envisions that 12 of the 18 voting members are either associated with providers of child care services or recipients of those services. Section 27-62(f) provides that the primary duty of MCCCC is to make recommendations to County government to "improve services in support of child care." If some members of MCCCC are prohibited from participating in any manner, including the expression of views and conveying information, in matters involving programs which directly benefit a business in which the member has an economic or fiduciary interest, the intent of the law creating MCCCC

[4] An example of a benefit available generally to child care providers is the voucher issued under the County's Working Parents Assistance Program. Under this program, vouchers are issued to income eligible parents to be used to purchase child care from any licensed provider.

would, in part, be frustrated. Accordingly, the Commission finds that granting a waiver would be in the best interest of the County.

2. The Ethics Commission believes that participation of a member of MCCCC in a matter which directly benefits a business in which the member has an economic or fiduciary interest creates a minimal conflict of interest because:

(a) The MCCCC does not make decisions regarding government funding of child care programs.

(b) The MCCCC has 18 voting members who represent differing interests. This creates a "check and balance" system within the MCCCC. For example, members who represent parents of children will tend to check the interests of members who represent providers of child care services. Even among the 7 members who represent service providers, there may well be competition for scarce government resources.

(c) The potential for harm resulting from a conflict of interest would be further minimized if a waiver is conditioned on a requirement that a member first disclose in an open meeting of MCCCC his or her relationship with the business in which the member has an economic or fiduciary interest. The disclosure should be made at each MCCCC meeting at which the matter is considered and prior to participating in the matter. This disclosure will enhance the "check and balance" mechanism built into the law creating MCCCC.

(d) MCCCC proposes to condition a waiver by limiting the participation of a member on matters that directly benefit a business in which the member has an economic or fiduciary interest to discussion only. The member would not be able to cast a vote on that matter. The Commission believes that this condition further insulates the County from any harm that may result from a conflict of interest caused by a member's participation in the matter.

3. There is no indication that granting a waiver in this matter will provide a member of MCCCC, including an industry representative, with an unfair advantage over other members of the public.

Accordingly, the Ethics Commission grants a waiver to members of MCCCC to participate in matters which directly benefit a business in which the member has an economic or fiduciary relationship, subject to the following conditions:

(1) Before participating in a matter which may directly benefit a business in which the member has an economic or fiduciary interest, the member must disclose the interest publicly in each meeting of MCCCC which considers the matter. This disclosure should be reflected in the minutes of MCCCC.

(2) The member's participation under this waiver must be limited to discussion only; the member must not vote on the matter.

II. Does the ethics law prohibit a member of MCCCC who is a parent from advocating funding of a County program that may benefit the member?

Section 19A-11(a)(1) prohibits a public employee from participating in a particular matter if the matter affects the public employee in a matter distinct from its effect on the public generally. Programs that benefit parents impact on significant numbers of individuals. Accordingly, the Commission concludes that advocating a program that benefits parents is participating in a matter that affects the public generally. An example of this type of program is the Working Parents Assistance Program in which vouchers are issued to income eligible parents to purchase services from any licensed child care provider. Consequently, the Commission concludes that the ethics law does not prohibit a member of MCCCC who is a parent from advocating a program that benefits that member along with other parents.

III. Is Opinion 90-1 still valid?

You have asked the Ethics Commission to consider whether Opinion 90-1 applies to members of MCCCC. In Opinion 90-1, the Commission concluded:

1. The ethics law applies to persons appointed to a County commission whether or not the person is compensated for serving on the body;
2. The ethics law provides that a public employee must not engage in outside employment without first obtaining the consent of the Ethics Commission;
3. The requirement of obtaining the consent of the Ethics Commission before engaging in outside employment does not apply to a member of a board or commission with regard to employment held at the time of appointment if that employment was publicly disclosed to the appointing authorities. This exemption applies to clients acquired by a self-employed member after appointment;
4. County procurement law prohibits a contractor with the County from employing a public employee at the same time as having a contract with the County;
5. County ethics law prohibits a public employee, without a waiver from the Commission, from being employed by an entity contracting with the agency with which the employee is affiliated;
7. A self-employed member of a board or committee subsequent to appointment, must not contract with the County or take as a client an entity which is subject to the authority of or contracts with the agency with which the employee is affiliated;

8. A member of a board or committee may, subsequent to appointment, contract with the County if the member obtains a waiver from the Ethics Commission or resigns prior to submitting a contract proposal to the County.

Opinion 90-1 was issued prior to the general revision of the County ethics law in 1990. The provisions relied on in Opinion 90-1, however, were unchanged by the 1990 revision of the ethics law. Section 19A-4(m) provides that a public employee includes any person appointed to a County commission whether or not the person is compensated for serving on the body. Section 19A-12(a)(1) provides that a public employee must not engage in other employment unless the employment is first approved by the Ethics Commission. Section 19A-12(c) exempts from the prohibitions of Section 19A-12(a) and (b) a member of a board, commission or similar body in regard to employment held when the employee was appointed if the employment was publicly disclosed before appointment to the appointing authority and to the County Council when confirmation is required. Section 11B-52 continues to prohibit a contractor from employing any public employee at the same time as having a contract with the County. Since the provisions and policies underlying the present ethics law do not constitute a change from the ethics law that applied when Opinion 90-1 was issued, the Ethics Commission reaffirms the validity of Opinion 90-1. Accordingly, the conclusions reached in Opinion 90-1 apply to members of MCCCC.

The Commission trusts you will find this memorandum responsive to your inquiry. If you have any questions, please do not hesitate to contact the Commission.